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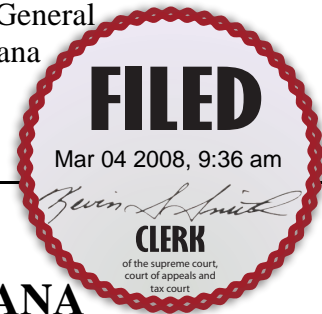
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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID L. MARTIN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0708-CR-687

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0510-FD-286

March 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

David L. Martin appeals the revocation of his probation. We affirm.

Issues

We restate the issues as follows:

- I. Whether sufficient evidence supports the trial court's finding that Martin violated his probation; and
- II. Whether the trial court abused its discretion in executing Martin's suspended sentence.

Facts and Procedural History

On December 5, 2005, pursuant to a plea agreement, Martin pled guilty to class D felony possession of a controlled substance (Xanax),¹ class A misdemeanor operating a vehicle while intoxicated, and class D felony operating a vehicle while intoxicated. The trial court merged the two latter counts and sentenced Martin to concurrent two-year suspended terms on the class D felony convictions. The court ordered the sentence to run consecutive to that imposed under another cause number and placed Martin on probation for two years.

On June 19, 2007, Anderson Police Department Officer David Reed was dispatched to provide backup to Sergeant Greg Kardatske. When Officer Reed arrived, Martin was “staggering around” outside his vehicle. Tr. at 6. Martin's eyes were glassy, and he appeared impaired. Sergeant Kardatske had put a couple pill bottles on top of Martin's vehicle and asked Martin “what he had hit, because the front left tire on his vehicle and the

¹ See Ind. Code § 35-48-4-7(a) (“A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or adulterated) classified in schedule I, II, III, or IV, except marijuana or hashish, commits possession of a controlled substance, a Class D felony.”); Ind. Code § 35-48-2-10(c) (listing Alprazolam, the medical name for Xanax, as a Schedule IV controlled substance).

rim was bent.” *Id.* Martin stated that he had prescriptions for the pill bottles. Officer Reed noticed, however, that a bottle labeled Hydrocodone contained both Hydrocodone pills and Xanax pills. Officer Reed also noticed that some of the Xanax pills inside the bottle were wrapped in a cigarette wrapper. Martin did not have a prescription for Xanax. Martin told the officers that he had been visiting his mother, who had been prescribed Xanax, and that they both collided while carrying their medications. According to Martin, the pills fell on the ground, and “he had accidentally picked up some of his mom’s Xanax and put it in his pill bottle.” *Id.* at 8.

On June 22, 2007, the State filed a notice alleging that Martin had violated his probation by failing to pay his probation fees and by committing class D felony possession of a controlled substance and being a habitual substance offender.² At the probation violation hearing on July 24, 2007, Martin admitted that he had been “behind” on his probation fees by \$150 as of June 22 but claimed that his probation officer had told him “that it was okay if [he] got a little behind on [his] fees[.]” *Id.* at 4. Officer Reed then testified to the facts described above. Sergeant Kardatske did not testify. Martin’s girlfriend, Amber Day, testified that the Xanax pills belonged to her. She stated that she had removed the pills from their original container on her doctor’s instructions because they had “street value” and could be stolen. *Id.* at 16. According to Day, she had borrowed Martin’s car and placed the Xanax

² See Ind. Code § 35-50-2-10(b) (“The state may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated substance offense convictions.”).

pills inside a cigarette wrapper and then inside one of Martin's pill bottles so that her three-year-old child could not access them while she was pumping gas.

The trial court found that Day's testimony was not credible³ and that Martin had violated his probation. The court then addressed Martin as follows:

Your claim is simply that this was a terrible mistake that somehow because Amber was trying to keep these Xanax away from her child, they ended up in your car while you were there for some unknown reason and the police had been called after you were already stopped, none of that makes any sense. And that, coupled with the fact, I think [the prosecutor] is right, I was prepared to hear you say, "People who struggle with addictions—struggle." Although the Courts would like to believe that we get our acts together and we're successful after Drug Court, it's a constant struggle and once in a while we slip backwards.[] When you are in denial of that, when you deny that you were impaired, when you concoct some story about the circumstances, then I'm not very optimistic that we can do anything ... to be helpful. And under those circumstances, the recommendation from the probation department is totally appropriate in this kind of repeat behavior. So, there is a 24 month exposure, 24 months is ordered executed at the Indiana Department of Correction, with credit back to June 19, '07. Of course, there is no return to probation. Mr. Martin, the Court has found you to be in violation of your probation. Your probation is being revoked.

Id. at 32-33.

Although the trial court did not orally make specific findings regarding its basis for revoking Martin's probation, the court's written order states that Martin violated his

³ See Tr. at 21 ("You were worried that [the Xanax pills] not be in a bottle that might be stolen because of the street value. You know there's substantial street value to Hydrocodone, don't you?"); *id.* at 21-22 ("Ms. Day's story is not very credible. She puts Xanax, according to her story, in a bottle that contains other controlled substances in the presence of Mr. Martin, who she knows has a substance abuse problem. She either does that to make it easier for him to use drugs, for which he does not have a prescription, or she does something very foolish. *I'm inclined to think that she probably didn't do it at all and Mr. Martin had the Hydrocodone and Xanax together.*") (emphasis added); *id.* at 31 ("[I]t is possible, it is possible, that the facts are as you [Martin] and Amber Day suggest. That seems to me to be unlikely, frankly."). On appeal, Martin complains that the trial court mischaracterized Day's testimony, in that she did not state that she put the Xanax pills in the Hydrocodone bottle in his presence. The italicized language strongly suggests that the trial court would have found Day's testimony incredible in any event.

probation by failing to pay his probation fees and by committing class D felony possession of a controlled substance and being a habitual substance offender. Appellant's App. at 8. Martin now appeals.

Discussion and Decision

I. Sufficiency of Evidence

Our standard of review in such cases is well settled:

Before a trial court may revoke a defendant's probation, the State must prove a violation of probation by a preponderance of the evidence. Ind. Code § 35-38-2-3(e). According to the statutes defining probation, "[i]f the person commits an additional crime, the court may revoke the probation." Ind. Code § 35-38-2-2(b). *When reviewing the sufficiency of the evidence to support a probation revocation, we neither reweigh the evidence nor reassess the credibility of the witnesses. Rather, we look only at the evidence most favorable to the State.* If there is substantial evidence of probative value to support the trial court's finding that a probation violation occurred, then we must affirm the trial court's decision.

Packer v. State, 777 N.E.2d 733, 740 (Ind. Ct. App. 2002) (emphasis added) (citations omitted). "Violation of a single condition of probation is sufficient to revoke probation." *T.W. v. State*, 864 N.E.2d 361, 364 (Ind. Ct. App. 2007), *trans. denied*.

In its written order, the trial court found that Martin violated his probation by failing to pay his probation fees. Martin does not specifically dispute this finding, claiming only that "his probation officer had told him it was okay if he got a little behind in his fees because he had two years of probation and he was focusing on paying for his house arrest fees, which were current." Appellant's Br. at 1. The trial court was free to disregard such self-serving testimony. Although the violation of a single condition of probation is sufficient to revoke probation, we briefly address the issue discussed at length in both parties' briefs, namely,

whether the State established that Martin violated his probation by committing class D felony possession of a controlled substance.

“Possession of an item can be characterized as either actual or constructive. Actual possession occurs when a person has direct physical control over the item. Constructive possession occurs when someone has the intent and capability to maintain dominion and control over the item.” *Hall v. State*, 831 N.E.2d 823, 826 (Ind. Ct. App. 2005) (citations and quotation marks omitted), *vacated in part on reh’g on other grounds*, 837 N.E.2d 159, *trans. denied* (2006). Martin asserts that the State presented no evidence that he actually possessed the Xanax, and thus he focuses solely on the issue of constructive possession. Because we may consider only the evidence most favorable to the State, we need not follow Martin down that path.

Officer Reed testified that Martin told him that “he had accidentally picked up some of his mom’s Xanax and put it in his pill bottle.” Tr. at 8. Viewed most favorably to the State, this testimony is sufficient to establish that Martin had direct physical control over the Xanax, i.e., that he actually possessed the controlled substance. The trial court was free to disbelieve Martin’s claim that his possession of the Xanax was accidental. Indeed, this claim is undermined by the fact that some of the Xanax pills were enclosed in a cigarette wrapper. In sum, we affirm the trial court’s finding that Martin violated his probation by failing to pay his probation fees and by committing class D felony possession of a controlled substance.⁴

II. Execution of Suspended Sentence

⁴ The parties do not address the trial court’s finding that Martin violated his probation by being a habitual substance offender.

As stated above, the trial court ordered the execution of Martin's two-year suspended sentence. Martin asks us to review that decision pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Recently, our supreme court explained that this is not the proper standard for reviewing a sentence imposed for a probation violation:

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. *Sanders v. State*, 825 N.E.2d 952 (Ind. Ct. App. 2005). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind. Code Ann. § 35-38-2-3 (West 2007); *Goonen v. State*, 705 N.E.2d 209 (Ind. Ct. App. 1999). Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. *See Sanders*, 825 N.E.2d at 956. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Guillen v. State*, 829 N.E.2d 142 (Ind. Ct. App. 2005).

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007).

Given that Martin violated his probation by committing the very same crime for which he had previously been convicted, we find no abuse of discretion in the trial court's execution of Martin's two-year suspended sentence.

Affirmed.

BAILEY, J., and NAJAM, J., concur.